THE HON'BLE SRI JUSTICE B. PRAKASH RAO

AND

THE HON'BLE SRI JUSTICE D. APPA RAO

WRIT APPEAL Nos.96 & 188 of 2006

and

WRIT PETITION No.21489 of 2005

6th March 2006

Writ Appeal No.96 of 2006:

(Writ Appeal under Clause 15 of the Letters Patent against the Order dated 29.09.2005 in W.P.No.9189 of 2004 on the file of the High Court.)

Between:

No.13976148-H Nk (N/Asstt)

Atal Bihari Acharya,

S/o Late H.K. Acharya.

Appellant/Writ Petitioner.

And

The Senior Registrar & Officer

Commanding Troops,

Military Hospital,

Secunderabad (AP) and three others.

Respondents/Respondents.

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AND

THE HON'BLE SRI JUSTICE D. APPA RAO

WRIT APPEAL Nos.96 & 188 of 2006

and

WRIT PETITION No.21489 of 2005

COMMON JUDGMENT: (Per Hon'ble Sri Justice B. Prakash Rao)

Heard Sri Captain K.M.Saxena, the learned counsel appearing for the appellant in the above appeals and also the petitioner in the above writ petition and Sri Deepak Bhattacharjee, the learned Standing Counsel appearing for the respondents in both the appeals and also the writ petition.

Since common questions are involved, all these three matters are taken up together for disposal.

Having heard the counsel in detail and on perusal of the material carefully, shorn of facts, the appellant in both the appeals and the petitioner in the writ petition was working as Nursing Assistant in the Army at the relevant point of time. While he was on duty on 19.01.2004 in the Family Ward II, Secunderabad, respondent No.3, who was admitted in the said Ward on 18.01.2004, made a complaint that the appellant-petitioner had gone to the Family Ward-II at 16.30 hours, called her to duty room and used criminal force with intent to outrage her modesty. A Court of Inquiry was held and ultimately a report was filed on 15.05.2004 holding that the appellant-petitioner is guilty of the same. Challenging the said proceedings, the appellant-petitioner filed both the Writ Petitions, *inter alia,* seeking to assail the entire action as initiated by the respondent No.6 himself as a Summary Court Martial, and having regard to the nature of allegation of commission of the offence under Section 354 of the Indian Penal Code and especially that it was already registered as a Calendar Case on the file of the XI Metropolitan Magistrate Court at Secunderabad, there could not have

been possibly any such enquiry by way of Court Martial, that too, in a summary way. On the face of it, the case has to be tried only in a Criminal Court but not by way of a Court Martial in view of the allegation as made against him. The contentions urged on behalf of the appellant herein were not found favour with the learned single Judge, which resulted in dismissal of the Writ Petitions. Hence, these appeals.

Subsequent to filing of the appeals, the appellant filed a separate writ petition, being Writ Petition No.21489 of 2005, challenging the validity of Section 69 of the Army Act, which contemplates holding of Court Martial trial, *inter alia*, on the self-same grounds, contending that the Army authorities could not have proceeded by way of Summary Court Martial and even if it were to be done so, the petitioner cannot be tried on any such questions especially when he can be tried in the normal law, more so, under the Code of Criminal Procedure before any regular Court.

We have taken into consideration the several submissions made across the Bar during the course of arguments, including the submission made by the Counsel for the appellant-petitioner that the regular appeal filed by the appellant-petitioner under Section 164 (2) of the Army Act on 21.10.2005 before GOC.IN.C, Southern Command, Pune, which is being opposed by the Army authorities, is still pending consideration. Since same questions are involved in the aforesaid substantial appeal, which is pending disposal, including the denial of opportunity etc., all those questions can as well be gone into and considered by the said appellate authority. Having availed such alternative remedy, it is not open to the appellant-petitioner to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. In view of the same, without expressing any opinion on the

merits, we deem it more appropriate to direct the appellate authority to dispose of the appeal as expeditiously as possible having regard to the nature of the allegation and the period of sentence. *Prima facie,* we find that it is not necessary for us, at this stage, to go into the validity of Section 69 of the Army Act when there is no conflict in regard to the procedure as contemplated under the said Act. These aspects can be considered by the appellate authority on merits and a finding can be recorded in regard to the correctness of the procedure adopted. In these circumstances, we are refraining from going into the validity of Section 69 of the Army Act, on which aspect no submissions have been made, except making submissions only on the merits of the case.

Accordingly, both the appeals and the writ petition are disposed of directing the appellate authority to consider and dispose of the appeal on merits and in accordance with law, after giving notice and opportunity to the appellant-petitioner herein, within a period of one month from the date of receipt of a copy of this judgment. To avoid any further delay, Office is directed to communicate the copy of this judgment to the respondents within a period of one week from today. The learned Standing Counsel for the Official respondents undertakes to take steps to convey the direction given for disposal of the appeal to avoid delay. It is needless to mention that the appeal shall be disposed of within the time as aforesaid, without insisting for compliance of any formalities, to avoid further delay on technicalities. The counsel for the appellant-petitioner is directed to serve a copy of the appeal petition on the Standing Counsel appearing for the Official respondents. There shall be no order as to costs.

B. PRAKASH RAO, J

D. APPA RAO, J

6th March 2006.

Chvn.

Note: CC in one week.

B/o

Chvn.